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SUPREME COURT, U. S

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

HOWARD WAGONHEIM, agent, GROVE PRESS, INC. and 5 WEST AMUSEMENT CO., INC.,

Appellants,

v.

MARYLAND STATE BOARD OF CENSORS,

Appellee.

APPEAL FROM THE COURT OF APPEALS OF MARYLAND

BRIEF *AMICUS* IN SUPPORT OF THE ATTORNEY GENERAL OF MARYLAND

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TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
POINT I—The criteria for the determination of obscenity are those enumerated in the Roth decision of this Court (*Roth* v. *United States*, 354 U. S. 476)	2
POINT II—Under the Roth standard the film "I am Curious Yellow" is obscene	5
POINT III—The concept of social value is not *per se* a valid, independent Supreme Court test of obscenity	6
POINT IV—The failure of the United States to appeal from the reversal of the lower court's determination that the film "I am Curious Yellow" was obscene, should not preclude a State Court or the United States Supreme Court from considering the question of the film's obscenity. (*United States* v. *A Motion Picture Film Entitled "I am Curious Yellow"*, 404 F2 196), 2nd Circuit 1968	9
POINT V—The verdict of the jury which has, under proper instructions, found that a film is obscene under the standards established by the United States Supreme Court, should not be disturbed	10
POINT VI—The exhibiting of a motion picture in a theater open to the public is inimical to the theory of permissible private possession	11
Conclusion	12

CASES CITED

PAGE

A Book named "John Clelands Memoirs of a Woman of Pleasure" v. Attorney General of the Commonwealth of Massachusetts, 383 U. S. 413 4

Freedman v. Maryland, 380 U. S. 51, 60-61 4

Jacobellis v. Ohio, 378 U. S. at 199; S. Ct. at 1686 .... 8, 11

Kingsley Books Inc. v. Brown, 354 U. S. 436, 448, 77 S. Ct. 1325, 1331, 1 L. Ed. 2nd 1469 11

Landau v. Fording, 245 Cal. App. a 820 4

Manual Enterprises v. Day, 370 U. S. 478 ..... 3, 7

Redrup v. New York, 386 U. S. 767 ..... 2, 8

Roth v. United States, 354 U. S. 476 ..... 2, 3, 5, 6, 8

Stanley v. Georgia, 394 U. S. 557 ..... 11, 12

U. S. v. A Motion Picture Film entitled "I am Curi-Yellow", 404 F2 196, 198 ..... 4, 5, 9

United States Constitution:

First Amendment 2, 5, 6, 12, 13

Fourth Amendment 12

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Preliminary Statement

Morality In Media, Inc., a membership corporation duly organized and existing under the Membership Corporation Laws of the State of New York, respectfully submits this memorandum in support of the Appellee and the Attorney General of the State of Maryland. Morality In Media, Inc. is an interfaith, charitable organization which is dedicated to initiate, promote, encourage and coordinate activities designed to safeguard and advance public morality, combat community and family deterioration which may be

effected by the dissemination of obscene materials and to support the enforcement of laws relating to the prevention and punishment of such dissemination and to promote constructive and morally uplifting publications and exhibitions in the various media, especially for the young. As *Amicus* in this action we join with and concur in the statement of Appellee. ; Rule 42, subdivision 2 of this Court has been complied with.

POINT I

The criteria for the determination of obscenity are those enumerated in the Roth decision of this Court. (*Roth* v. *United States*, 354 U. S. 476.)

Unfortunately, the standards to determine whether or not material is obscene are not clear. In many prior cases involving the question of obscenity in this Court, a minority of Justices have adopted different standards in defining obscenity (*Redrup* v. *New York*, 386 U. S. 767). Basically, all such determinations begin with the landmark decision of this Court in *Roth* v. *United States* (*supra*). In that case Mr. Justice Brennan, in delivering the opinion of the Court, stated (354 U. S. —— 489) the test as follows:

> "Whether to the average person applying contemporary community standards the dominant theme of the material taken as a whole appeals to prurient interest."

The Court also stated that the First Amendment rejected obscenity "as utterly without redeeming social importance" (354 U. S. —— 484).

This latter concept was not part of the test but a statement as to the merits of the material found "obscene" under the test enunciated in the former quotation. Other criteria have been drawn from this or added to it. The so-called "patently offensive" test is an example of one

of these accretions. This concept is often attributed to the case of *Manual Enterprises* v. *Day* (370 U. S. 478). In coining this phrase the Court (by Mr. Justice Harlan) stated (370 U. S. —— 482):

> "These magazines cannot be deemed so offensive on their face as to affront current community standards of decency—a quality that we shall hereafter refer to as 'patent offensiveness' of 'decency.'".

This criterion was advanced only by a minority of the Court, but, more importantly, it is significant that the material under consideration in this case was a magazine catering to or which had appeal to homosexuals. The Court was, in this case, delving into the question of indecency by community standards. The theory of the "Roth test" or "prurient interest test" was applied to a particular type publication. It was in this context or with this emphasis in mind that the idea of "patent offensiveness" was given birth. It is submitted that the consideration here was to proscribe that type of sexual material that went beyond the community standard because it was offensive to decency; that this emphasis in Manual Enterprises (*supra*) arose because of the type of material being considered by the Court. No novel general test was added, it only became necessary to find further expression to clarify the concept advanced by Roth (*supra*). The necessity grew out of the proposition that homosexual material probably did not have an appeal to prurience to the average person, but only to a class of people, the homosexual. Since this time however, ordinances defining "obscene" by using only the community standard of prurient interest test were not objectionable as omitting the quality of patent offensiveness. If a work appeals to prurient interest of the average American judged by community standards it is patently offensive.* This rationale

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* Cf. cases collected in D.D. "Obscenity" Key 5.

also applies to the "Utterly without redeeming social value" concept as proposed by three Justices in the "Memoirs" case, see Point III *infra* (A Book named "*John Cleland's Memoirs of a Woman of Pleasure*" v. *Attorney General of the Commonwealth of Massachusetts*, 383 U. S. 413). Again, a community standard test was actually used with the emphasis on social value caused by the nature of the material under review.

> "A book cannot be proscribed unless it is found to be utterly without redeeming social value." (383 U. S. 419).

Mr. Justice Brennan wrote, in an opinion for a minority of the Court, concerning a novel written in 1750. The vehicle of expression is the determining factor in which emphasis should be placed on the basic "Roth" test. Different emphasis is necessary where homosexual magazines are reviewed; where a two-hundred year old novel is reviewed; and where a contemporary motion picture graphically depicting sexual intercourse is reviewed.

The overwhelming psychological impact of a motion picture must be considered—must be the subject of applying the proper emphasis—in determining the question of obscenity. (*Freedman* v. *Maryland*, 380 U. S. 51, 60-61; *U. S.* v. *A Motion Picture film entitled "I am Curious, Yellow"*, 404 F2 196, 198; *Landau* v. *Fording*, 245 Cal. App. a 820).

In films of contemporary origin the idea of "utterly without redeeming social value" should not be applied. Clearly, a two-hundred year old novel, where the only presentation is the printed word cannot be judged with the same emphasis as the contemporary film with graphic portrayals of moving pictures on a lighted screen accompanied by sound and dialogue. It is submitted that in judging films the "prurient interest" emphasis in the *Roth* case is truly the only consideration worthy of exami-

nation in deciding whether any film is obscene. It is also submitted that the essence of the First Amendment right to "Free Speech" is predicated on the right of an individual to exchange ideas, the right to express opinion. In cases where the ultimate aim is profit through the exploitation of sexual encounters in a film, should not this be questioned as "protected" expression? Is it not a valid question to consider the relevancy and necessity of the sexuality in relation to the communication of the idea? The only real test for obscenity is embodied in the *Roth* case.**

POINT II

Under the Roth standard the film "I am curious Yellow" is obscene.

The film "I am Curious Yellow" uses an explicit portrayal of cunnilingus, sexual intercourse and deviate sexual practices allegedly to convey a host of vague, apathetic social comments which apparently were necessary to the film especially when the central characters become too exhausted to indulge in further immediate sexual pursuits. As Mr. Justice Lumbard stated in his dissent in *United States* v. *A Motion Picture Film entitled "I am Curious Yellow"*, 404 F2 196, at page 203,

> "Whatever one can say about the alleged significance of the film, which to this captive onlooker was a continuous and unrelieved boredom except for the sexual scenes, it is almost impossible to remember anything about it. The only impact the picture has and the only impact it was designed to have are the sexual

** Certain Justices seemingly justify their apparent divergence from the Roth test. Whereas, in actuality, merely the emphasis required by the particular material under review would suffice. Motion pictures require such emphasis to be placed on the possible prurient impact of the medium itself and the relevancy of the sexuality to the conveyance of the idea.

scenes; its only interest to the viewer arises from the uncertainty of the method of mutual sexual gratification in which hero and heroine will next indulge."

What is I am Curious Yellow—telling social commentary or the exploitation of sex for profit? Is the idea the thing or a half-hearted attempt to wrap the film in an aura of social value and mask the ultimate purpose of the film; thereby creating a continuous exploitation of explicit sexuality for profit? It is in this situation that the proper emphasis of the pure Roth rule applies. The attempt the director of the film makes toward social value is merely fitted between sexual acts, and is therefore a sham. The subject film is obviously obscene.

POINT III

The concept of social value is not *per se* a valid, independent Supreme Court test of obscenity.

In recent obscenity decisions, lower courts have been working on the theory that the *Roth* test of 1957 has been "modified" since it was originally handed down. They read the law as requiring:

(1) That the dominant theme of the material, taken as a whole, must appeal to the prurient interest in sex of the average person.

(2) That the material must be "patently offensive."

(3) That the material must be "utterly without redeeming social value."

But is this really true? The *Roth* case was the only one where a majority of the Supreme Court concurred on any test; and in that case, the Court said:

"The unconditional phrasing of the First Amendment was not intended to protect every utterance

> All ideas . . . having even the slightest redeeming social importance have the full protection of the guarantee . . . But implicit in the First Amendment is the rejection of obscenity as utterly without redeeming social importance. This rejection for that reason is mirrored in the universal judgment that obscenity should be restrained, reflected in the international agreement of over 50 nations, in the obscenity laws of all 48 states, and in the 20 obscenity laws enacted by the Congress from 1842 to 1956. This is the same judgment expressed by this court in *Chaplinsky v. New Hampshire* . . . 'There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality . . .'"

The Court continued:

> "We hold that obscenity is not within the area of constitutionally protected speech or press."

The test (is):

> "Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest."

From where, then, do these other two tests come? Supposedly the "patently offensive" test came from *Manual Enterprises v. Day*, a 1962 decision. But, what is left unsaid, is that in that case the Court could not agree upon an opinion. The "patently offensive" test is one

proposed *only* by Justice Harlan and Justice Stewart. Theoretically, the third test came from *Jacobellis* v. *Ohio*, in 1964. Again, the Court did not agree on an opinion, and this test was one proposed by Justice Brennan. Many assume that it was finally built in by *A Book* v. *Attorney General* (*Fanny Hill*) in 1966. But, here again the Court could not agree upon an opinion and this so-called test was one proposed by Justices Brennan, Warren and Fortas. Justice Clark, in a dissenting opinion in *Fanny Hill*, called the social value test "novel" and noted that only three members held to it. He said it rejects the basic holding of *Roth*.* (16 Lawyers' Ed., 2d p. 18 sequitur). Even later, in the *Redrup* case in 1967, the *per curiam* opinion cites the necessity of a three-pronged test as one held only by certain justices in the *Fanny Hill* case. It does not cite it as the test of the Supreme Court.

The only test agreed upon by the Court—is the one cited in the *Roth* decision and there you observe, the Court —speaking clearly—tells us that once applying its test and determining that an utterance is obscene, there is no consideration of social importance since obscenity is of such "slight social value as a step to truth, that any benefit to be derived is clearly outweighed by the social interest in order and *morality*." Obviously, under the *Roth* case the charge to a jury is the prurient interest test. There is nothing in the prurient interest test that requires a finding of "utterly without redeeming social value". Under the Roth rule "utterly without redeeming social value" would not be considered by the jury and therefore, cannot be considered since the *Roth* case is the only precedent we have.

The majority opinion of Judge Hays and Judge Friendly concurring in "A Motion Picture Entitled 'I am Curious

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* Justice White also agreed with Justice Clark that the "utterly without redeeming social value" concept contradicted the *Roth* case (at p. 461).

Yellow' " (404 F2 196) only adds confusion to an area of Constitutional Law that has already been severely criticised. If one follows the theory advanced by Justice Friendly one finds that he joins with Chief Judge Lumbard in holding that the governing rule in Roth was satisfied; that the film violates the "prurient interest" test. However, Judge Friendly gives more credence to the "Memoirs" utterly without redeeming social value—so called test. In effect, this means that a majority opinion of the United States Supreme Court, which has never been overruled, yields to a minority opinion of three Justices. See Judge Barnes concurring opinion in the instant case currently reviewed.

See also decision by Judge Paul LaPrade, Superior Court, State of Arizona, Maricopa County. Rendered Dec. 8, 1969, and decision by Judge Joseph Tauro, Suffolk County Superior Court, Commonwealth of Mass. rendered Nov. 12, 1969.***

POINT IV

The failure of the United States to appeal from the reversal of the lower court's determination that the film "I am Curious Yellow" was obscene, should not preclude a State Court or the United States Supreme Court from considering the question of the film's obscenity. (*United States* v. *A Motion Picture Film Entitled "I am Curious Yellow"*, 404 F2 196), 2nd Circuit 1968.

The record of the District Court is quite clear. It was the judgment of the jury, after proper instruction by Judge Murphy, that the film, presently being considered, was obscene. The 2-1 decision to reverse, on appeal, the jury's

*** Both cases concerned the film "I Am Curious Yellow", and both judges stated that utterly without redeeming social value is not a Supreme Court test of obscenity.

determination did not close the question of the film's possible obscenity. The United States had every right to take an appeal from this decision. The fact that it did not exercise that procedural right did not forever foreclose any future consideration of whether or not this film was obscene. This election of the United States not to take an appeal in no way mitigates against a state Court or superior federal court making its own determination on the merits of the film's obscenity.

On the contrary, if this case in the Second Circuit of the United States Court of Appeals has merit, or relevancy to the matter before the Court the vigorous dissent by Chief Judge Lumbard should be carefully considered.

POINT V

The verdict of the jury which has, under proper instructions, found that a film is obscene under the standards established by the United States Supreme Court, should not be disturbed.

Notwithstanding that there has been no jury trial in the present matter before this Court, it should be noted that a jury trial did, in fact, take place in the United States District Court for the Southern District of New York, concerning this particular film. That it was the verdict of the jury, under proper instructions from Judge Murphy, that the film "I Am Curious Yellow" was obscene. On appeal, this decision was reversed; however, in a strong dissenting opinion Chief Judge Lumbard said, at page 203:

> "All are agreed that Judge Murphy's charge correctly stated the law and instructed the jury. Indeed, Counsel for the Appellant took no exception whatever to the charge. I see no good reason why that jury verdict should be disturbed."

It is also noteworthy that Judge Lumbard observes later on, at page 204:

> "The action of the majority in nullifying the findings of the jury here goes beyond any case thus far decided in the obscenity area. No case is cited and I can find no case where the Supreme Court has set aside the verdict of a jury which has, under proper instructions, found present the three elements of obscenity as established by Roth v. United States. . . .". "There is no reason to suspect that judges are in any better position to pass judgment on these matters than are jurors."

See also Judge Lumbard's quotation of Mr. Justice Brennan's remarks in *Kingsley Books Inc.* v. *Brown*, 354 U. S. 436, 448, 77 S. Ct. 1325, 1331, 1 L. Ed. 2nd 1469 (dissenting opinion) and Chief Justice Warren's dissenting opinion in *Jacobellis* v. *Ohio*, 378 U. S. at 199, 84 S. Ct. at 1686, to the same effect. While the instant case is not a jury case, a jury has reviewed this film, after proper charge, in a prosecution wherein the defendant was afforded due process. This jury determination shows clearly that the subject film goes beyond contemporary community standards in its presentation of sexual scenes. (An expression on this point by the Court at this time would revitalize confidence in our jury system and quiet critics of Court's handling of jury determinations in obscenity cases.)

POINT VI

The exhibiting of a motion picture in a theater open to the public is inimical to the theory of permissible private possession.

The recent case of *Stanley* v. *Georgia* (394 U. S. 557), recognized that the mere private possession of obscene material, in one's own home, is not a crime *per se* (at p. 568). The very essence of this decision is an individual's

right to privacy and should not be abrogated since it is guaranteed by the Fourth Amendment to the Constitution. No stretch of the imagination will support the theory that this private constitutional right should be extended to a public motion picture theater. The rational of the *Stanley* case is not grounded in licensing obscenity but in giving protection to the individual's right to be master over his own soul and to exercise his free will inside his own home. No further application of the holding in the *Stanley* case was ever intended.

Conclusion

It is time that the United States Supreme Court reiterated the Roth test and makes it clear that the concept of utterly without redeeming social value is not and was never a part of that test; and we urge this be done.

This will enable the legislatures to redefine obscenity in those states which have added the erroneous social value so called test.

The power of a State and the Federal Government to regulate conduct has been universally recognized as a mandate of the people. The election by the governed to be governed is inherent in our nation since its formation and is inalienable. Trial by jury has been an integral part of that government by the people. To suppose there is some super power greater than this, which mandates that the people have some lesser right, as in the area of publishing and exhibiting materials which could be considered obscene, is sheer folly. It follows that no private enterprise should receive more consideration than the individual or collective rights of the people. Notwithstanding the fact that the private enterprise is involved in exhibiting a motion picture and this form of expression has been attempted to be equated with our First Amendment rights, does this transcend the inalienable rights of the people?

This separate, private entity, whether it be Grove Press, Inc. or any other business does not have the right to foist its wares on the people under the guise that this is their right of freedom of expression.

The concept of freedom of expression is vastly different, and should not be equated with the exploitation or sale of sex for profit. Such exploitation or sale is not one of the reasons that freedom of speech has been guaranteed under the First Amendment. The purposes of that guarantee is that no transmission of ideas would or could be stifled. That expressions, even those critical of our government, would not be proscribed, for that was the very manner in which our government found its formation. That this concept is healthy and should persevere if our form of government is to be vibrant in its existence.

The sale of sex for profit has nothing to do with the free transmission of idea or the open discussion of political affairs and should not be afforded this First Amendment privilege.*

The State has the power, and exercises it through its laws mandated by the people, to regulate public displays of sexual activity or conduct. Consequently, it is reasonable to assume that the State has the right to regulate the sale or exposition of sex for profit. This indulgence of using a freedom as a license for monetary gain should bring it outside the pale of the First Amendment protection.

If our constitutional privileges are to continue to be meaningful and remain beyond repression, they should be carefully delineated from the unscrupulous who would use them for financial purposes. There is no question that the decision of this Court should turn on the principle

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* The real purposes of the First Amendment can only be degraded by the inclusion of a film like I Am Curious Yellow within the First Amendment's protection.

that the private interest should surrender to the public good.

For the foregoing reasons, the judgment of the Court below should be affirmed and the Motion Picture "I Am Curious Yellow" should be declared obscene.

Respectfully submitted,

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